

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

DAVID F. KELLY BEY,	:	
	:	
Petitioner	:	
	:	
v.	:	CIVIL NO. 3:CV-12-2005
	:	
DANIEL S. KEEN,	:	(Judge Conaboy)
	:	
Respondent	:	

MEMORANDUM
Background

David F. Kelly Bey, an inmate presently confined at the Franklin County Prison, Chambersburg, Pennsylvania, filed this pro se petition pursuant to 28 U.S.C. § 2254. Named as Respondent is Warden Daniel Keen of the Franklin County Prison. Service of the Petition was previously ordered.

The Petition states that Kelly Bey is seeking habeas corpus relief with respect to the following seven (7) criminal cases, 1642-01; 1643-01; 1644-01; 1645-01; 595-07; 1025-07; and 1026-07. See Doc. 1, ¶ 1. Petitioner explains that on August 24, 2007 he entered a nolo contendere plea to those charges¹ in the Franklin County, Pennsylvania Court of Common Pleas. Kelly Bey adds that he filed an unsuccessful direct appeal to both the

¹ Kelly Bey describes the charges as being for resisting arrest, receiving stolen property, escape; fleeing or attempting to elude police, false identification, driving without a license, and disorderly conduct.

Pennsylvania Superior Court and thereafter to the Pennsylvania Supreme Court. However, Petitioner acknowledges that he can't recall what claims were raised on direct appeal or the dates those appeals were denied.

Petitioner also asserts that he pursued a June 8, 2008 challenge to his nolo contendere plea pursuant to Pennsylvania's Post Conviction Relief Act (PCRA).² He maintains that this action which included multiple arguments including ineffective assistance of counsel is still pending before the Franklin County Court of Common Pleas. See id. at ¶ 11(a).

An earlier action filed by Petitioner with the Court of Common Pleas on June 26, 2007 which purportedly argued that the trial court lacked jurisdiction is likewise pending before the trial court. According to the Petition, Kelly Bey also filed a third action with the Court of Common Pleas on April 4, 2008 asserting lack of jurisdiction with respect to the convictions being challenged herein.

Presently pending is Respondent's motion to dismiss the petition for Kelly Bey's failure to satisfy the in custody requirement. See Doc. 9. The motion contends that as of the

² The PCRA permits motions for post-conviction collateral relief for allegations of error, including ineffective assistance of counsel, unlawfully induced guilty pleas, improper obstruction of rights to appeal by Commonwealth officials, and violation of constitutional provisions." Hankins v. Fulcomer, 941 F.2d 246, 251 (3d Cir. 1991).

filing of this action, Petitioner "completed his sentences" in all of the criminal cases referenced in this matter. Id. at ¶ 3. Respondent's supporting brief similarly maintains that the sentences for all the docket numbers cited in Kelly Bey's pending Petition "have expired" and he "is not in custody on these cases." Doc. 10, p. 1. Petitioner has not responded to the motion or sought an enlargement of time in which to do so.

Discussion

Pursuant to 28 U.S.C. § 2254(a), a habeas petitioner must make a showing that he is "in custody pursuant to the judgment of a State Court." See also Carfas v. LaVallee, 391 U.S. 234, 238 (1968) (a habeas petitioner must be in custody under the conviction or sentence under attack at the time his petition is submitted). In Maleng v. Cook, 490 U.S. 488 (1989) (per curiam), the United States Supreme Court addressed a challenge to a state conviction by an applicant who had already completed service of his entire sentence. The Court held that § 2254(a)'s in custody requirement was satisfied because the challenged conviction was used to enhance a subsequently imposed sentence which the applicant had not yet begun to serve. See id. at 493. Consequently, the Court concluded that the habeas petition could be properly construed as a challenge to the subsequent sentence.

In Daniels v. United States, 532 U.S. 374 (2001), the Supreme Court established that a prior sentence used to enhance a

federal sentence is no longer open to collateral attack via a motion under 28 U.S.C. § 2255. In reaching that determination, the Court stressed the need for finality of convictions and ease of administration.

A subsequent Supreme Court ruling, Lackawanna County v. Coss, 532 U.S. 394 (2001), addressed Coss' challenge to his 1986 state conviction which he was no longer serving. Specifically, Coss claimed that his 1986 conviction resulted from ineffective assistance of counsel. Coss was serving a 1990 sentence and he contended that he could still challenge the 1986 sentence because it had negatively impacted his 1990 sentence. The Supreme Court, again noting the need for finality of convictions and ease of administration, held that Coss did not qualify to have his § 2254 petition reviewed because the expired prior conviction did not actually increase the length of his current sentence.

"[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." Maleng, 490 U.S. at 492. As noted by the Supreme Court in Daniels, habeas corpus and similar collateral remedies "are not available indefinitely and without limitation." Daniels, 532 U.S. at 375. The Court in Coss noted that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies (or because the defendant did so unsuccessfully) the conviction may be regarded

as conclusively valid." Coss, 532 U.S. at 403. See also Maleng, 490 U.S. at 492 (federal habeas corpus relief should not be extended "where a habeas petitioner suffers no present restraint from a conviction.").

In the present case, Petitioner clearly acknowledges that he is challenging an August 24, 2007 Franklin County sentence of eighteen (18) to sixty (60) months. Based upon Petitioner's own description of the length of the maximum duration of his sentence, this Court agrees with Respondent's contention that Kelly Bey has completed service of the sentence which is the subject of this § 2254 action. Moreover, Respondent has submitted a copy of a letter dated July 19, 2012 which regards Kelly Bey's post conviction filings in the Franklin County Court of Common Pleas. Petitioner's letter concisely admits that the criminal cases which are the subject of his state petitions as well as this action should be disregarded "because I've already served the time on those sentence [sic] and is no longer in custody."³ Doc. 10-1, p. 6.

Based upon a careful review of Kelly Bey's pending habeas corpus petition Kelly Bey does not raise any allegation or claim that the sentence which he is presently serving was increased by

³ This letter also offers possible explanation that the Franklin County of Common Pleas has not acted on Petitioner's PCRA and post conviction matters based upon an assumption that those filing have been withdrawn.

his August 24, 2007 sentence.⁴ Moreover, there are simply no facts presented which could support such a claim.

In conclusion, Respondent has submitted a written admission by the Petitioner himself that the criminal sentence being challenged in this action has expired. Second, there has been no showing made in this matter that this is a situation where a habeas petitioner is seeking to challenge a current sentence on the grounds that it was increased/enhanced by an expired conviction and sentence. Pursuant to the standards announced in Maleng, Daniels, and Coss, Kelly Bey's present § 2254 petition, as stated, may not be entertained by this Court. The petition for writ of habeas corpus will be dismissed. An appropriate Order will enter.⁵

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: DECEMBER 6, 2012

⁴ This Court acknowledges that Petitioner recently filed a § 2254 petition on November 16, 2012 challenging an October 6, 2010 Franklin County sentence. See Kelly Bey v. Keen, Civil No. 3:12-CV-2283. The dismissal of this matter has no bearing on that filing.

⁵ In the event that Kelly Bey can show that the August 24, 2007 sentence which is the subject of this action was used to increase/enhance the criminal sentence which he is presently serving, he may file a motion for reconsideration within fourteen (14) days of the date of this Memorandum and Order.

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